2016

Eagle Mountain City Plaintiff/ Appellant, vs. Parsons Kinghorn Harris, a Professional Corporation, Defendant/ Appellee.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

EAGLE MOUNTAIN CITY Plaintiff/Appellant, vs. PARSONS KINGHORN HARRIS, a professional corporation, Defendant/Appellee.	**BRIEF OF APPELLEE** Case No. 20150915-CA District Court No. 130300194

ON APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT OF UTAH COUNTY HONORABLE JAMES BRADY PRESIDING

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Appellees request oral argument and a published decision.

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COMPLETE LIST OF PARTIES

In addition to the parties listed in the caption, the below listed third-party defendants are included in the Answer and Amended Third-Party Complaint. (R. 141-167.) The claims against all of them except Williams & Hunt, P.C. were dismissed by the district court. (R. 739-748, Memorandum Decision; R. 767-773, Order.)

- Monte Vista Ranch, L.C.
- Legends Land and Ranch, LLC
- Eagle Mountain Communities, LLC
- Eagle Mountain Properties, LC
- EM Development, LLC
- John W Walden, LLC
- Cedar Valley-White Ranch, LC
- Cedar Valley Investments of Utah, LLC
- MVR Management, LLC
- John Walden
- Robyn Walden
- Andrew Zorbis
- Williams & Hunt, P.C.

Following entry of the district court's October 2, 2015 Ruling granting Parsons Kinghorn Harris's Motion for Summary Judgment against Eagle Mountain City, the district court dismissed the third-party complaint against Williams & Hunt, P.C. without prejudice on November 10, 2015. (R. 2689-2691.)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under Rule 3 of the Utah Rules of Appellate Procedure and Utah Code Ann. § 78A-4-103. The district court granted summary judgment in favor of Defendant/Appellee Parsons Kinghorn Harris (hereinafter referred to as "PKH") in the court's October 2, 2015 Ruling on Defendant's Motion for Summary Judgment (hereinafter "10/2/15 Ruling").[1] (R. 2626-2642).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Was the district court correct in dismissing Eagle Mountain City's ("EMC"') complaint because EMC's Settlement Agreement with Cedar Valley Water Company ("CVWC") and their joint Contingent Fee Agreement ("CFA") with Snell & Wilmer ("SW"), constitute an assignment of a legal malpractice claim which is void based on public policy grounds? (*See* R. 2627-2628, 2641, 2759-2760.)

B. Was the district court correct in ordering that EMC may re-file its legal malpractice claim against PKH only if EMC "satisfies the Court that it will be prosecuted independently of the settlement agreement[,]" and "[t]o do so, at a minimum EMC needs to establish that its litigation is not controlled in any way by CVWC, and that EMC is not represented by attorneys associated with CVWC"? (R. 2641).[2]

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[1] Judge Brady stated at the conclusion of his Ruling that "[t]his Ruling and Order is final, and no further order is required." (R. 2641.)

[2] EMC's Issue 2 as stated (EMC's Opening Brief at 2) was not preserved in the district court. EMC cites for preservation to R. 2724 from the summary judgment hearing transcript and R. 3428 from EMC's memorandum in opposition to PKH's summary judgment motion. R. 3428 argues that "Snell & Wilmer's Involvement Does Not Wrest the City's Control." It says nothing about failure to move for disqualification. Likewise, at R. 2724

C. Should the district court have granted PKH's motion for summary judgment and dismissed EMC's complaint with prejudice as requested by PKH? "Summary judgment may be affirmed on any ground available to the trial court, even if it is one not relied upon below."[3]

Preserved: (R. 2796-2797; 3105-3106.)

STANDARD OF REVIEW

This is an appeal from summary judgment. The court reviews a grant of summary judgment de novo, applying the same legal standard as the district court. "Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[4]

This standard applies to all parts of the 10/2/15 Ruling, including that EMC may only re-file the Malpractice Case upon the condition that it is not represented by attorneys associated with CVWC, namely Snell & Wilmer ("SW"). The 10/2/15 Ruling is based on the issue of control.[5]

STATEMENT OF THE CASE

This case (hereinafter "the Malpractice Case") arises from the $4,560,000 settlement of CVWC's lawsuit against EMC in Case No. 090402122 filed on June 3, 2009, in the Fourth District Court of Utah County ("the Underlying Case") wherein CVWC sued

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SW argued (incorrectly) that the CFA "doesn't say Snell & Wilmer is going to side with [CVWC]" if EMC and CVWC get into a contest.

[3] *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶ 42, 70 P.3d 904 (internal citation and quotation marks omitted.)

[4] *Torian v. Craig*, 2012 UT 63, ¶13, 289 P.3d 479.

[5] *See* footnote 2, *infra*.

EMC for breach of a contract between CVWC and EMC known as the 2000 Town Well #1 Capacity Purchase Agreement ("the CPA"), which was entered on February 15, 2000. (*See e.g.,* R. 16-17, Complaint in Malpractice Case at ¶¶ 53, 60; R. 2801-2823, Complaint in Underlying Case.)

The law firm of Snell & Wilmer represented CVWC in the Underlying Case and also represented CVWC and EMC in this Malpractice Case. In June 2009, CVWC filed the Underlying Case against EMC for breach of the CPA. CVWC ultimately claimed it was owed some $8.8 million under the CPA. In two motions for partial summary judgment that were ruled on during the course of the Underlying Case, however, the district court ruled that CVWC was only owed approximately $420,000, including pre-judgment interest.[6] (R. 2849, 2865-2866.)

On February 5, 2013, EMC and CVWC settled the Underlying Case for, among other things, EMC's agreement to pay CVWC $4,560,000. The settlement was memorialized by a Settlement Agreement and a Contingent Fee Agreement ("CFA"). (R. 3051-3054, Settlement Agreement; R. 3056-3064, Contingent Fee Agreement.) The CFA was incorporated into and is part of the Settlement Agreement. As a specific term of the Settlement Agreement, CVWC and EMC agreed in the CFA to jointly retain SW to represent them and to prosecute the Malpractice Case against PKH and to share the proceeds obtained from the Malpractice Case.

[6] An additional approximately $200,000 was added for fees and litigation expenses.

On December 10, 2013, the Malpractice Case was filed against PKH. (*See* R. 1-23.) The Malpractice Case alleged, among other things, that PKH, through attorney Gerald Kinghorn, who was EMC's City Attorney from 1997 through shortly before his death on May 31, 2012, had incorrectly advised EMC not to collect impact fees from development applicants, which allegedly resulted in the settlement. (*See* R. 19, 21 Complaint, ¶¶ 69, 74; R. 38, Answer, ¶ 74; R. 2989, Brabson Depo. 11:17-20.)

On February 13, 2015, PKH moved for summary judgment on the grounds that the Settlement Agreement and the CFA constituted an unenforceable assignment of a legal malpractice claim. (*See* R. 2759-2799.) On October 2, 2015, the district court issued the 10/2/15 Ruling granting the motion. (*See* 10/2/15 Ruling, Addendum A; R. 2626-2642.) The 10/2/15 Ruling held that EMC, through the Settlement Agreement and the CFA, had partially assigned its malpractice claim to CVWC by transferring a substantial degree of control over the litigation to CVWC and by granting CVWC an interest in EMC's property rights, in violation of public policy. (See R. 2632-2635.)

While PKH's summary judgment motion requested dismissal with prejudice, PKH acknowledged that a dismissal without prejudice was an alternative. The district court's 10/2/15 Ruling dismissed EMC's Complaint without prejudice and held that EMC could re-file its malpractice claims against PKH only if EMC met two conditions: (1) that EMC was not controlled in any way by CVWC; and (2) that EMC was not represented by any attorneys associated with CVWC. (R. 2641.)

STATEMENT OF FACTS

Background of the Underlying Case

On February 15, 2000, EMC entered the CPA with CVWC. In general, under the CPA, EMC agreed to purchase the water capacity of Well # 1 from CVWC and to pay for the capacity through the collection of water impact fees from developers of approved subdivisions under certain specific triggering conditions and pursuant to an Impact Fee Ordinance ("IFO") required to be adopted by EMC under the CPA. (R. 3658-3674.)

The Underlying Lawsuit

On June 3, 2009, CVWC, by and through its counsel SW, filed the Underlying Case alleging that EMC had breached the CPA by not collecting and remitting impact fees to CVWC. (R. 2801-2803.) Although both parties initially asserted that the CPA was unambiguous, they disagreed on its interpretation and on what conditions triggered EMC's requirement to collect impact fees. (R. 2841, 12/13/10 Ruling on Motion for Partial Summary Judgment at 1.)

CVWC alleged that the CPA required EMC to collect a $720 impact fee on every lot from the developers of every subdivision approved by EMC after the date the CPA was signed. CVWC claimed that to the extent even a single molecule of water from Well #1 was commingled into EMC's overall water system then every lot was using water from Well # 1 and therefore owed the impact fee. This became known as the "water molecule theory." (*See* R. 2886, EMC's 7/9/10 Combined Memorandum in Opposition to CVWC's

Motion for Partial Summary Judgment and in Support of EMC's Motion for Partial Summary Judgment ("7/9/10 Memo") at 11.)[7]

EMC argued that its obligation to collect impact fees from developers under the CPA was triggered only by certain specific events based upon the language in the CPA, the Impact Fee Ordinance passed by EMC in conjunction with the CPA, and the long-accepted legal meaning of point of diversion, a term of art under Utah water law.[8] EMC argued that these triggering events had not occurred and that therefore EMC had not breached the CPA. (*See* R. 2876-2892, 7/9/10 Memo.)

Consistent with EMC's position, on December 13, 2010, District Judge David Mortensen issued his Ruling on Motion for Partial Summary Judgment in the Underlying Case, and held that EMC's interpretation of the triggering events under the CPA was correct. He rejected CVWC's water molecule theory. (*See* R. 2844-2845, 2847-2848, 12/13/10 Ruling at 4-5, 7-8; R. 2767-2768, 2876-2878.) Judge Mortensen held: "This court concludes that the parties intended to only have the impact fee apply when transfers of water were proposed and those transfers identified Well # 1 as a point of diversion." (R. 2848, 12/13/10 Ruling at 8.) Referring to the 12/13/10 Ruling, WH told EMC that "Judge

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[7] Because Kinghorn was a material witness in the Underlying Case, he could not represent EMC in the litigation and Williams & Hunt ("WH") was retained as EMC's counsel.

[8] Specifically, EMC argued: "The unambiguous language of the documents, given the meaning and application of the term 'point of diversion,' establishes that the parties intended that impact fees be collected and paid to Cedar Valley when development is approved along with an assignment of water rights to the City which included the Well [# 1] as a point of diversion. That unambiguous intent precludes Cedar Valley's recovery under its theory of diversion." (R. 2885, 7/9/10 Memo at 10.)

Mortensen agrees with our interpretation of the operative provisions of the [CPA] . . . ." (R. 2898.)[9]

The significance of the 12/13/10 and 11/30/11[10] Rulings in support of EMC's defense and adverse to CVWC's position in the Underlying Case was shown in CVWC's January 17, 2013[11] pre-trial memorandum opposing EMC's objections to CVWC's trial exhibits and EMC's motions in limine. (R. 2956-2985.) In a 30-page memorandum, CVWC argued, among other things, that Judge Mortensen was not bound by his prior Rulings, that he must consider extrinsic evidence to determine if the CPA was ambiguous, that the integration clause in the CPA was not controlling, and that CVWC's competing interpretation of the CPA was reasonable thus showing the CPA was ambiguous. (*See id.*)[12]

In addition, notwithstanding Judge Mortensen's 12/13/10 Ruling rejecting the water molecule theory, in early January 2013, CVWC presented two spreadsheets calculating CVWC's damages at $8.5-8.8 million in the Underlying Case. The calculations assumed

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[9] Judge Mortensen's 12/13/10 Ruling found that a single lot met the triggering events and awarded $720 to CVWC. CVWC filed a Second Motion for Partial Summary Judgment in 2011 ("Second Motion"). Judge Mortensen issued a November 30, 2011 Ruling (R. 2855-2874) in which he granted the Second Motion in part, and concluded that CVWC had located several additional subdivisions which met the trigger requirements set forth in the 12/13/10 Ruling for collecting impact fees. This resulted in an award of approximately $420,000 plus fees and expenses. (*See*11/30/11 Ruling, R. 2861-2863.) However, Judge Mortensen denied CVWC's Second Motion, in part, holding that EMC was not required to collect impact fees on numerous lots in several subdivisions because water rights assigned for those lots had been approved for use in Well # 1 before the effective date of the CPA and were therefore not covered by the CPA. (*See* 11/30/11 Ruling, R. 2861-2863.)

[10] *See* Note 9.

[11] Trial was scheduled to begin on or about February 5, 2013.

[12] Judge Mortensen never decided these issues because of the settlement.

and applied the water molecule theory, *i.e.*, that a $720 impact fee should have been collected from every lot in every approved subdivision since the CPA was signed, without regard for the triggering event requirements established by Judge Mortensen's 12/13/10 Ruling.[13]

Settlement of the Underlying Case

After the Underlying Case was not settled at a December 2012 mediation, City Administrator Ifo Pili ("Pili") continued negotiations with CVWC's principal, John Walden ("Walden"). (*See* R. 2905, Jackson Depo. 215:4-22, 216:11-217:1; R. 3003, Pili Depo. 86:23-87:8.) Pili suggested incorporating a legal malpractice claim against PKH as a term of a proposed CVWC-EMC settlement. Pili told Walden that EMC "would try to get money from [PKH] and share it with [CVWC]" "as a means of trying to convince [CVWC] to accept a lower amount of settlement [from EMC.] (R. 3004, Pili Depo. 92:6-93:6.) The settlement terms were identified in emails dated January 23, 2013 between Pili and EMC's attorney, George Hunt of WH, as follows:

a. Payment [by EMC] of $2 mil now;
b. Payment [by EMC] of $500K in one year;
c. Payment [by EMC] of $300K in two years;
d. John [Walden] receives [an additional] approximately $1.7 mil via collection [by EMC] of water impact fees;
e. ***Parties [EMC and CVWC] jointly prosecute claim against PHK [sic] and share proceeds equally***;
f. Pending case dismissed with prejudice and on the merits.

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[13] R. 3482-3500 (1/3/13 email from SW (CVWC's lawyer) to WH (EMC's lawyer) transmitting the spreadsheets, Ex. D to EMC's Opposition to PKH's Motion for Summary Judgment.)

(R. 3021.) (emphasis added.) Hunt stated that "Snell & Wilmer will handle the PHK [sic] claim on a contingent fee basis and will thus receive a third of the proceeds. . . . [¶] Per our [Hunt's and Pili's] discussions, these all appear to be terms that were acceptable to the City, ***except perhaps having Snell & Wilmer handle the claim.***" (R. 3021-3022.) (emphasis added). Pili responded to WH that "As per our conversation we are in agreement with the 6 terms . . . Regarding # 5 [the agreement that EMC and CVWC would jointly prosecute a malpractice claim against PKH], we would like a separate document to be drafted to memorialize the term. . . ." (R. 3021.)

On February 5, 2013, the EMC City Council approved the settlement by a 3-2 vote. (R. 3049, Kofoed Depo. 62:8-63:15.) The February 5, 2013, settlement was memorialized in a written Settlement Agreement together with the CFA. (R. 3051-3054, Settlement Agreement; R. 3056-3064, Contingent Fee Agreement.)

Legal Malpractice Case

On December 10, 2013, the Legal Malpractice Case was filed against PKH. (*See* R. 1-23.) On February 13, 2015, PKH moved for summary judgment on the grounds that the Settlement Agreement with CVWC included an unenforceable assignment of a legal malpractice claim. (*See* R. 2759-2799.)[14]

EMC's opposition included Declarations signed by Pili (R. 3828-3833) and Heather

[14] It is unclear why EMC persists in complaining about the timing of EMC's motion for summary judgment. (*See e.g.*, EMC's Opening Brief at 4, 9.) The motion was filed well within the deadlines of the court's Scheduling Order, and EMC makes no argument that it was in any way legally improper because of the date it was filed.

Jackson (R. 3835-3839). EMC attempted to use Pili's Declaration to explain what EMC "always understood" and "knew" during the settlement negotiations in the Underlying Case regarding what CVWC's decision-making authority would be in the Malpractice Case. (R. 3828-3333, ¶ 14.) In its reply summary judgment memorandum, PKH objected to this evidence on several grounds, including that (1) Pili's pre-signing thoughts about the CFA are immaterial because the CFA is an integrated document; (2) lack of foundation and speculation; (3) hearsay; and (4) EMC's refusal to produce documents of closed-session City Council meetings potentially relevant to the declaration. (R. 4132-4133.) EMC also attempted to use Pili's and Jackson's Declarations to explain EMC's choice of SW as counsel in the Malpractice Case. (R. 3828-3833, ¶ 15 (Pili); R. 3835-3839, ¶ 13 (Jackson).) PKH objected to this evidence in its reply memorandum on various grounds, including that Pili's declaration contradicted his deposition testimony and that both Pili's and Jackson's declarations lacked foundation. (R. 4133-4135.)

Summary Judgment Ruling

On October 2, 2015, the district court issued the Ruling granting summary judgment to PKH. (*See* 10/2/15 Ruling, Addendum A, R. 2626-2642.) The 10/2/15 Ruling addressed two issues: first, does the Settlement Agreement between EMC and CVWC and their joint CFA with SW (which the district court referred to jointly as "Agreements") constitute an assignment of a legal malpractice claim. Second, if yes, does the assignment bar EMC from pursuing its malpractice claims against PKH. (R.2627-2628.) In deciding these issues the district court stated:

Both parties spent much time and effort informing the Court of the facts and

issues raised in the underlying case, most of which are not material to either question. From ***the affidavits and other evidence presented***, the court finds the following facts are both material and uncontested[.][15]

The twelve material and undisputed facts that the district court found are the following:[16]

1. EMC is suing PKH claiming legal malpractice based on tort and contract theories.[17]

2. EMC alleges, among other things, that:

   a. Pursuant to the 2001 Town Well # 1 Capacity Purchase Agreement, an Impact Fee Ordinance ("IFO") was enacted by EMC, City Ordinance No. 00-02, in 2000.

   b. Under the terms of the IFO, EMC would collect impact fees under certain specific triggering events from "development applicants" that transferred water rights to EMC which relied on Well # 1 as the point of diversion.

   c. EMC did not collect impact fees from developers based on PKH's alleged incorrect advice.

   d. PKH, through attorney Gerry Kinghorn, who was EMC's City Attorney, allegedly incorrectly advised EMC from 2000 through 2011 not to collect impact fees.

   e. PKH's improper advice allegedly damaged EMC because EMC is required to pay CVWC money it would not have had to pay if EMC had collected impact fees from developers, including $4,560,000 that EMC is required to pay CVWC as part of the February 5, 2013 Settlement of the Underlying Case. This allegedly constitutes professional negligence, breach of fiduciary duty, and breach of contract.[18]

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[15] R. 2628, 10/2/15 Ruling at 3 (emphasis added.)

[16] R. 2628-2631, 10/2/15 Ruling at 3-6, ¶¶ 1-12.
[17] R. 2628, 10/2/15 Ruling at 3.
[18] R. 2628-2629, 10/2/15 Ruling at 3-4.

3. Snell & Wilmer represented CVWC in the Underlying Case against EMC.[19]

4. On February 5, 2013, EMC and CVWC finalized the settlement of the underlying case and memorialized it in a signed written Settlement Agreement and a separate Contingent Fee Agreement.[20]

5. Excluded from the Release contained in the Settlement Agreement "are any and all claims [EMC] may have against its own attorneys [PKH], as set forth in the Contingent Fee Agreement identified in paragraph 7" of the Settlement Agreement.[21]

6. Paragraph 7 of the Settlement Agreement, entitled "Integration," states: Except as expressly stated herein, this Agreement and a companion Contingent Fee Agreement, ***contain the entire agreement and understanding of the parties with respect to the subject matter hereof, and integrates all prior conversations, discussions or undertakings of whatever kind or nature and may only be modified by a subsequent writing duly executed by the parties hereto.***[22]

7. EMC and CVWC entered into the Contingent Fee Agreement in connection with settling the underlying case.[23]

8. The Contingent Fee Agreement is binding upon EMC, CVWC and SW and their respective heirs, legal representatives and successors and assigns in interest.[24]

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[19] R. 2629, 10/2/15 Ruling at 4.

[20] R. 3051-3054, Settlement Agreement; R. 3056-3064, Contingent Fee Agreement.

[21] R. 3052, ¶ 5. EMC incorrectly asserts that this exclusionary language shows that it did not assign its legal malpractice claim. (EMC's Brief at 17.) However, the claim that is excluded from the Release is the malpractice claim that EMC may have against PKH "as set forth in the [CFA]." Since the CFA then provides for the joint prosecution of the malpractice claim by EMC and CVWC against PKH (together with all the other provisions of the CFA which give CVWC control and an interest in the claim), EMC actually facilitated the assignment of the malpractice claim by excluding it from the Release.

[22] R. 3053, Settlement Agreement at 3, ¶ 7 (emphasis added.)

[23] R. 3056, CFA at 1, Recital C.

[24] R. 3061, CFA at 6, ¶ 8.f. ("This Agreement includes the entire agreement between Clients [CVWC and EMC] and the Attorney [SW] regarding this matter, and can only be modified if another written agreement is signed by the Clients and the Attorney. This Agreement shall be binding upon both the Clients and the Attorney and their respective heirs, legal representatives and successors and assigns in interest.")

9. The Contingent Fee Agreement provides among other things that:

   a. As part of the settlement of the Underlying case, EMC is obligated to file and prosecute the Malpractice Case against PKH.[25]

   b. Both EMC and CVWC retain SW as their attorney to prosecute the Malpractice Case on EMC's and CVWC's behalf against PKH.[26]

   c. Since both CVWC and EMC are clients of SW, "communications between the jointly represented Clients and [SW] are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. Accordingly, [SW] is free to share with both Clients communications and information which [SW] has or obtains from any of the Clients respecting the [Malpractice Case.]"[27]

   d. EMC, CVWC, and SW will each receive one-third of any recovery from PKH in the Malpractice Case, after payment of costs, and absent an appeal.[28]

   e. SW's one-third contingent fee is calculated on the amount of sums recovered from PKH (including its insurers), after out of pocket expenses are first deducted from such recovery.[29]

   f. All costs incurred in connection with the Malpractice Case shall be paid by CVWC, including payments in advance when requested by SW, and such costs shall be reimbursed to CVWC first from any recovery realized in the Malpractice Case.

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[25] R. 3056, CFA at 1, Recital C.

[26] *Id.* at 1, Recital D ("City [EMC] and Cedar Valley [CVWC] desire to retain Attorney [SW] to bring the lawsuit against PKH . . .."); *see also id.* at 1 ("THIS AGREEMENT ('Agreement') is entered into effective as of February 5, 2013 among Eagle Mountain City ('**City**'); Cedar Valley Water Company, LLC ('**Cedar Valley**') and Snell & Wilmer L.L.P. ('**Attorney**'). ***City and Cedar Valley are sometimes referred to herein collectively as 'Clients.'")*** (emphasis added.); R. 3058-3059, CFA at 3-4, ¶ 5 entitled "Joint Representation." (emphasis in original.)

[27] R. 3058-3059, CFA at 3-4, ¶ 5.b.

[28] R. 3056, 3057, CFA at 1, Recital E and CFA at 2, ¶ 1.

[29] R. 3057, CFA at 2, ¶ 1.

Those costs include "sums expended for subpoenas, photos, photocopies, scanning, facsimiles, telephone calls, exhibits used at hearings, depositions, court reporter costs, reports, witness statements, expert witnesses, and all other out-of-pocket expenses directly incurred in investigating or litigating the [Malpractice Case against PKH].["] [30]

g. Costs shall also include the out of pocket expenses that [CVWC] and [EMC] incurred in connection with the prosecution of the claims on the 2000 Agreement, which amounts the parties agree shall be reimbursed from the first proceeds of any recovery on the [Malpractice Case against PKH].[31]

h. EMC cannot settle the Malpractice Case without CVWC's consent. Absent mutual agreement, the parties must first mediate and subsequently submit, if necessary, to mandatory arbitration.[32]

i. EMC and CVWC consent to SW's continued representation of CVWC in connection with the enforcement of, or any dispute arising from or between [EMC] and [CVWC] relating to the Settlement Agreement, except as may be required by the Utah Rules of Professional Responsibility, ***[SW] will represent the interests of [CVWC] against the interests of [EMC]***.[33]

10. John Walden signed the Contingent Fee Agreement on behalf of CVWC as its Managing member.[34]

11. Ifo Pili signed the Contingent Fee Agreement on behalf of EMC as its City Administrator.[35]

12. Mark Morris signed the Contingent Fee Agreement on behalf of SW as a Partner.[36] [37]

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[30] R. 3057, CFA at 2, ¶ 3.
[31] *Id.*
[32] R. 3060, CFA at 5, ¶ 7.
[33] R. 3060, CFA at 5, ¶ 6.e. (emphasis added.)
[34] R. 3062 at 7.
[35] *Id.*
[36] *Id.*
[37] In its opening brief, EMC does not claim that the Facts the district court found to be

After identifying the above facts, the district court rendered its legal analysis, including:

> EMC's argument that it has not assigned the claim to CVWC are [sic] inconsistent with the content of the Agreement. Even the Recitals to the [CFA] provides that, **"City [EMC] and Cedar Valley [CVWC] desire to retain Attorney to bring the Lawsuit against PKH . . ."** This provision begs the question, if CVWC did not receive even an assignment of interest in EMC's claims, why does CVWC "desire to retain the attorney" to pursue the claim? Paragraph 5, 5 b., and 6 e. of the [CFA] also support that EMC and CVWC believe they each have the need for legal representation to pursue their interests in the EMC malpractice claim.[38]

The district court identified multiple parts of the CFA which "grant some of EMC's interests in the [Malpractice C]ase to CVWC." (R. 2633-2644, 10/2/15 Ruling at 8-9.) Further, the district court held that "[a]ssignment of rights to a legal claim, or chose in action, may include assignment to the right to control litigation of the claim, and/or assignment of property interest in the proceeds from the litigation." (R.2634, 10/2/15 Ruling at 9.) The district court concluded that the Settlement Agreement and the CFA "grant CVWC an[] interest in both controlling the litigation and in the potential proceeds from the litigation." (*Id.*)

The district court articulated several provisions of the integrated Settlement Agreement and CFA that establish the "transfer of a substantial degree of control over

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material and undisputed are immaterial or disputed. Moreover, EMC's preoccupation with PKH's alleged negligence is of no consequence to this appeal as that is not the issue to be decided and for purposes of the summary judgment motion, the allegations were accepted as undisputed facts. (*See* R. 2628-2629, 10/2/15 Ruling at 3-4, ¶¶ 1, 2.c., 2.d., and 2.e.)

[38] R. 2632, 10/2/15 Ruling at 7 (emphasis in original.)

litigation decisions from EMC to CVWC in . . . EMC's malpractice claim." (R. 2634-2635, 10/2/15 Ruling at 9-10.) These include:

> The provisions of the Agreements requiring EMC to 1) File the present lawsuit as condition to settle the underlying litigation[;] 2) Be represented by a specific attorney agreed to by CVWC[;] 3) Allow the attorney to jointly represent EMC and CVWC in this case[;] 4) Waive client confidentiality with the attorney in this case to allow SW to disclose information regarding the litigation to CVWC[; and] 5) Obtain prior approval by CVWC before [EMC] can settle the claim, or if the parties disagree, ultimately submit its rights to settle its case to binding arbitration.[39]

The district court further explained the significance of these provisions to the transfer of control, indicating:

> The Settlement Agreement states that it is integrated with the [CFA]. Therefore CVWC appears to have the ability to enforce these conditions, with the threat that EMC will suffer the consequences of a failed Settlement Agreement in the underlying case if EMC were to exercise independence in controlling its litigation decisions. Whether or not EMC and CVWC currently have any disagreements regarding these conditions is immaterial. It is sufficient for purposes of this motion that CVWC has the apparent ability to force EMC to forego its ability to independently control its litigation in the event a disagreement arises in the future.[40]

Regarding EMC's transfer of a property interest in the Malpractice Case to CVWC, the district court stated:

> The Agreements also grant CVWC a property interest in EMC's claim. The Agreements go beyond providing security for payment of the Settlement amount in the underlying case. Instead of granting a security interest for a sum certain, the Agreements grant an uncertain amount, based on a percentage of the total recovery. The Agreements grant[] CVWC an interest in EMC's property rights. It also grants CVWC a pecuniary incentive to maximize the amount of recovery by EMC.[41]

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[39] R. 2634, 10/2/15 Ruling at 9.
[40] R. 2635, 10/2/15 Ruling at 10.
[41] R. 2635, 10/2/15 Ruling at 10.

The district court concluded that the Settlement Agreement and the CFA constituted a partial assignment of the malpractice claim and provided a detailed discussion of why EMC's complaint should be dismissed on public policy grounds. (R. 2635-2641, 10/2/15 Ruling at 10-16.)[42] The district court "considered the following public policy concerns and rulings by courts in other states regarding the assignability of legal malpractice claims": exploitation and merchandising of malpractice claims, preservation of the sanctity of the client-lawyer relationship, an abrupt and shameless shift of positions in the malpractice case, and no distinction between a[n] assignment of a cause of action and an assignment of recovery. (R. 2637-2640.)

The district court recognized the importance of each of these public policies, and expressly agreed with the conclusion that the difference between assigning a cause of action and assigning the expectancy of recovery from the cause of action is a "meaningless distinction [designed] to circumvent public policy." (R. 2640.) And even though EMC did not specifically state "We hereby assign our malpractice claim to CVWC," the district court correctly recognized that that is not the standard by which the existence of an assignment is determined, stating:

> [I]t is obvious that the Agreements transfer to CVWC a substantial level of EMC['s] control over the litigation decisions and a substantial portion of EMC's property rights. Although the [CFA] was drafted to state, "the parties agree," the [CFA] and the Settlement Agreement are merged, establishing the

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[42] While acknowledging that no Utah case has expressly decided whether legal malpractice claims are assignable, the district court recognized the majority position from other jurisdictions holds that malpractice claims cannot be assigned. (R. 2636-2637.) The district court adopted the majority position "[b]ecause of the public policy issues supporting the non-assignability of legal malpractice claims." In addition, "[n]either party argued that this Court should adopt the minority position." (R. 2637.)

potential that a violation of the [CFA's] terms may result in consequences to EMC's benefits under the Settlement Agreement.

Based on the assignment of substantial control over litigation decisions and an interest in the potential proceeds of the current litigation the court finds the Agreements violate public policy.

. . . .

Nothing in this order prohibits EMC from pursuing its claims against PKH for malpractice. However, EMC may not do so under the restrictions placed on it by the Agreements. . . . [A]t a minimum, EMC needs to establish that its litigation is not controlled in any way by CVWC, and that EMC is not represented by attorneys associated with CVWC.

ORDER

EMC's Complaint against PKH is dismissed without prejudice. EMC may re-file its claims against PKH if it establishes that it is not controlled in any way by CVWC and is not represented by attorneys associated with CVWC.[43]

SUMMARY OF ARGUMENT

This Court should affirm the district court's decision to adopt the majority position that legal malpractice claims cannot be assigned. The district court's grant of summary judgment was proper because the material undisputed facts establish that the Settlement Agreement and the CFA constitute an assignment of EMC's legal malpractice claim. An assignment occurred here because there was a transfer of control and a transfer of interest in EMC's malpractice claim to CVWC. Specifically, the Settlement Agreement and CFA require that (1) EMC (together with CVWC) prosecute the Malpractice Case against PKH, (2) EMC share proceeds from the Malpractice Case with its former adversary (CVWC),

[43] R. 2640-2641, 10/2/15 Ruling at 15-16.

and (3) CVWC pay the cost of bringing the Malpractice Case. In addition, the Agreements prevent EMC from independently settling the malpractice claim without CVWC's consent or a mandatory arbitration. Moreover, if EMC and CVWC become conflicted over the enforcement of the Settlement Agreement and CFA, EMC must retain separate counsel, while SW is entitled to continue to represent CVWC.

Public policy prohibits this transfer of control and interest because of the personal nature of the attorney-client relationship, including duties of loyalty and confidentiality, as well as the need to avoid the unseemly shift and role reversals taken by EMC in the Malpractice Case as compared to the Underlying Case. In addition, EMC's exploiting and merchandising of its legal malpractice claim by using it to negotiate more favorable settlement terms in the Underlying Case and the concomitant opportunity and incentive for collusion are inimical to public policy.

EMC's argument that there are disputed issues of material fact which the district court ignored is incorrect. Because the Settlement Agreement and CFA are integrated and unambiguous documents, no extrinsic evidence is admissible or necessary. In any event, the district court clearly stated that he had reviewed all the evidence, including the affidavits in deciding which facts were material and undisputed.

This Court should affirm the summary judgment and order dismissal of the Malpractice Case ***with prejudice*** as requested by PKH in its summary judgment motion. Such relief has been ordered by other courts and is appropriate in the instant case. Indeed, EMC's argument on appeal that SW be allowed to continue as its counsel in a re-filed case shows that EMC has consciously chosen to reject the benefit of a dismissal without

prejudice and an opportunity to re-file on certain express conditions, including that SW not represent EMC. Given that EMC is choosing not to accept this option, the Court should dismiss with prejudice.

If this Court chooses to affirm the dismissal without prejudice, then the district court acted appropriately in ruling that EMC may re-file its malpractice claim only after it has established, at a minimum, that (1) EMC is not controlled "in any way by CVWC" in the re-filed litigation and (2) SW is not involved with the re-filed claim. SW was counsel for EMC's adversary (CVWC) in the Underlying Case right up to the settlement. Immediately after settlement, SW became counsel for both CVWC and EMC, but SW's ultimate allegiance in the case of a conflict is to CVWC under the terms of the CFA even though SW and CVWC have had full access to EMC's attorney-client communications for at least three years. SW's duties to CVWC clearly implicate CVWC's right to and actual control over the Malpractice Case. It would be impossible for EMC to establish that its malpractice claims were being re-filed free of the assignment if EMC is still represented by SW.

ARGUMENT

A. The Court of Appeals Should Adopt the Majority Position That Legal Malpractice Claims Are Not Assignable.

EMC concedes that the majority of jurisdictions that have considered the issue hold that legal malpractice claims cannot be assigned and that the Utah Supreme Court will likely adopt this position. (EMC's Opening Brief at 17.) As such, the Court should first adopt the majority rule and hold that legal malpractice claims are not assignable. The Court should then apply that law to the facts of this case and affirm the district court's decision

that the Settlement Agreement and CFA constitute an assignment which violates public policy.

While the courts in Utah have not directly ruled on the issue, the Utah Court of Appeals and the United States District Court for the District of Utah have both commented on it. Both believed that the Utah Supreme Court would adopt the majority position. In *Tanasse v. Snow*,[44] the Utah Court of Appeals assumed that a "legal malpractice action cannot be voluntarily assigned"[45] and stated that "[m]ost courts that have considered [the issue]" have concluded that "legal malpractice claims are personal and cannot be assigned."[46] The Court cited numerous cases holding to the majority view.[47]

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[44] 929 P.2d 351 (Utah App. 1996)

[45] *Id.* at 352

[46] *Id.*

[47] The Court of Appeals cited the following cases as holding to the majority view that legal malpractice claims are not assignable: *Schroeder v. Hudgins*, 142 Ariz. 395, 690 P.2d 114, 118 (Ariz. Ct. App. 1984); *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83, 86 (Ct. App. 1976); *Roberts v. Holland & Hart*, 857 P.2d 492, 495-96 (Colo. Ct. App. 1993); *Mickler v. Aaron*, 490 So.2d 1343, 1344 (Fla. Dist. Ct. App. 1986); *Brocato v. Prairie State Farmers Ins. Ass'n*, 166 Ill. App. 3d 986, 520 N.E.2d 827 (Ill. 1988); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991); *Coffey v. Jefferson County Bd. Of Educ.*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1988); *Moorhouse v. Ambassador, Inc.*, 147 Mich. App. 412, 383 N.W.2d 219, 221 (Mich. Ct. App. 1985); *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966, 966 (Nev. 1982). The Utah Court of Appeals further explained: "Some courts adopting the majority view reason that a legal malpractice claim arises out of a contract for personal services, and thus, like the underlying contract, is not assignable. *E.g.*, *Goodley*, 133 Cal. Rptr. at 86; *Roberts*, 857 P.2d at 495-96. Others view a legal malpractice claim as akin to a personal injury cause of action, which is not assignable." *E.g.*, *Schroeder*, 690 P.2d at 118-19." *Tanasse*, 929 P.2d at 353.

One of the cases cited by the Utah Court of Appeals is *Goodley v. Wank & Wank, Inc.*,[48] a seminal case prohibiting the assignment of legal malpractice claims, in which the court stated:

> Our view that a chose in action for legal malpractice is not assignable is predicated on the unique personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon.
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> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. . . . The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.[49]

Another case cited by the Utah Court of Appeals is *Picadilly, Inc. v. Raikos*,[50] where the Supreme Court of Indiana held that the assignment of a legal malpractice claim to a client's adversary is invalid based on two primary public policy grounds – "the need to preserve the sanctity of the client-lawyer relationship, and the disreputable public role reversal that would result during the trial of assigned malpractice claims . . .." [51] Regarding the client-lawyer relationship, the Court stated that "[a]ssignment of legal malpractice claims would weaken at least two standards that define the lawyer's duty to the client: the

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[48] 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Ct. App. 1976)
[49] 133 Cal. Rptr. at 87.
[50] 582 N.E.2d 338 (Ind. 1991)
[51] *Id.* at 342.

duty to act loyally and the duty to maintain client confidentiality."[52]

In *United States Fid. & Guar. Co. v. United States Sports Specialty Ass'n,* 2012 U.S. Dist. LEXIS 179683 (D. Utah), the federal district court commented "that the Utah Supreme Court would likely adopt the majority rule and hold that legal malpractice claims may not be assigned." *United States Fid. & Guar. Co.,* 2012 U.S. Dist. LEXIS 179683, *7-8.[53]

Many of the reasons articulated in *Goodley,* and *Picadilly, Inc.* for non-assignability are present in the instant case, including that: (i) CVWC, which never has had an attorney-client relationship with PKH, holds a substantial interest in the case; (ii) the attorney-client privilege between PKH and EMC is dissolved, so that CVWC has access to what were otherwise privileged communications, thus embarrassing the attorney-client relationship and imperiling the highly confidential and fiduciary relationship between PKH and EMC; (iii) by negotiating the malpractice claim as a means to reduce the settlement amount in the Underlying Case, EMC used the malpractice claim as a marketable commodity; (iv) PKH is forced to defend itself against an entity, CVWC, with whom it never had an attorney-client relationship and to whom it never owed any duty, and with respect to which it represented adverse interests; (v) champerty is effectively promoted because CVWC is paying all the costs involved in prosecuting the Malpractice Case and is entitled to be

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[52] *Id.*

[53] In support of this conclusion, the Utah federal district court referenced Docket No. 255, at 11. *See United States Fid. & Guar. Co.,* 2012 U.S. Dist. LEXIS 179683, *8 and fn. 6. Docket No. 255 is subject to a protective order and therefore, is not publically available on the Court's docket.

reimbursed both those costs and the costs it incurred in the Underlying Case first from any proceeds of the Malpractice Case.

The complicated and litigious intricacies of the assignment are also shown by the terms of the CFA. They include waivers of attorney-client privilege, waivers of existing and future conflicts of interest involving SW, EMC and/or CVWC, and even the agreement by EMC and CVWC for SW to represent CVWC adverse to EMC with respect to any disputes involving the Settlement Agreement.

In light of the strong majority position on this issue and the relevant commentary from Utah courts, it was appropriate and correct for the district court to conclude that a legal malpractice claim cannot be assigned.

B. The District Court Correctly Ruled That EMC Assigned Both an Interest in, and Control of, its Legal Malpractice Claim to CVWC.

In *Davis v. Scott*,[54] the Kentucky Supreme Court affirmed the dismissal of a malpractice claim based on an unenforceable assignment. There was no express assignment. The facts showed that Davis sought legal advice from attorney Scott regarding a non-solicitation agreement with PICA whereby Davis agreed not to communicate with or solicit PICA's customers for 15 months if a purchase agreement between PICA and Davis did not close, which it did not. PICA was purchased instead by Global Risk Management ("Global"). Scott failed to advise Davis to stop communicating with PICA's former clients, and Davis eventually obtained three of them as his clients. PICA and Global

[54] 320 S.W.3d 87 (Ky. 2010).

sued Davis for breach of the non-solicitation agreement. Eventually, Davis settled with Global and agreed to pay $300,000.

The settlement agreement also "required Davis to pursue a legal malpractice claim against Scott and to assign 80% of the proceeds of that claim to Global."[55] Davis could not settle the malpractice case without Global's express written consent and the attorney Global chose to represent Davis in the malpractice case would be allowed to communicate with Global regarding the claim, including sharing attorney-client privileged information from Davis.

The malpractice case was filed against Scott. After substantial discovery had been conducted, the trial court granted Scott's motion for summary judgment and dismissed Davis's claims with prejudice on the ground "that the settlement agreement constituted an improper assignment of a legal malpractice claim and was void as against public policy." *Id.* at 90. On appeal, the Kentucky Supreme Court stated:

> "The creation and existence of an assignment is to be determined according to the intention of the parties, which is to be discerned not only from the instruments executed by them, if any, but from the surrounding circumstances." 6A C.J.S. *Assignments* § 57 (2010). Courts will look to substance, not form, to determine whether an assignment has occurred. 6 Am. Jur. 2d *Assignments* § 83 (2010). . . . "No particular form is necessary to constitute an assignment . . . ." *Napier v. Duff*, 281 Ky. 779, 135 S.W.2d 1083, 1085 (1939).[56]

The Court rejected Davis's and Global's argument that their settlement only assigned proceeds and was not an assignment of the claim:

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[55] *Id.* at 89.
[56] 320 S.W.3d at 91.

> Both Davis and Global contend that it was their intention to assign merely the proceeds of the malpractice claim against Scott. The surrounding circumstances, however, belie this assertion. By the terms of the settlement agreement, Global selected and retained Davis's counsel in the malpractice action and bore the financial responsibility for the cost of suing Scott. Because Davis is obligated to bring the action, he may not withdraw the suit. Davis is not permitted to settle the malpractice claim without Global's express written consent. Davis agreed to share privileged, attorney-client information with Global. Global retained control over the initiation, continuation and/or dismissal of the malpractice claim.[57]

The Court was troubled by the allocation of the proceeds, not only because Global was to receive 80%, but also because "Global receives a percentage of the damages awarded as opposed to a specified dollar amount. Therefore, its interest is not only in a successful claim, but a claim with the largest judgment possible. This is further indication of Global's ownership of the lawsuit."[58] Thus, the Court concluded:

> This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. *See Greene v. Leasing Associates, Inc.*, 935 So.2d 21, 25 (Fla. Dist. Ct. App. 2006 (noting that assignor 'was not free to control the conduct of the litigation and to accept or reject any settlement offers,' in determining that prohibited assignment of legal malpractice claim occurred). . . . The terms of this settlement agreement essentially placed the control of the malpractice suit in Global's hands and rendered Davis's interest merely nominal.[59]

Similarly, in *Gurski v. Rosenblum & Filan, LLC*, the Supreme Court of Connecticut stated:

> We conclude that an assignment of a legal malpractice claim or the proceeds from such a claim to an adversary in the same litigation that gave rise to the alleged malpractice is against public policy and thereby unenforceable.
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[57] *Id.*
[58] *Id.* at 91.
[59] *Id.*

> Finally, we agree with those courts that have identified the "meaningless distinction" between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments. *Town & Country Bank of Springfield v. Country Mutual Ins. Co.*, 121 Ill. App. 3d 216, 218, 459 N.E.2d 639, 76 Ill. Dec. 724 (1984). We will not engage in such a nullity.[60]

Many of the same characteristics in *Davis* and *Gurski* are present in the instant case. EMC cannot settle without CVWC's consent. EMC's counsel is the same counsel who represented CVWC in the Underlying Case where they were adverse to each other. Contrary to EMC's argument (*see* EMC's Brief at 21-23) *Gurski* shows that the issue is not simply whether EMC chose SW as malpractice counsel,[61] but rather that SW was counsel for EMC's adversary (CVWC) in the Underlying Case and continues to be CVWC's counsel in the Malpractice Case. Attorney-client privileged communications between EMC and SW are not privileged vis-à-vis CVWC. EMC cannot drop the lawsuit on its own motion. CVWC receives not only the $4,560,000 settlement amount but also 33% of any and all proceeds from the Malpractice Case. In addition, CVWC pays all the costs of the Malpractice Case and is entitled to reimbursement ***up front*** of those costs, as well as their costs incurred in the Underlying Case, from any Malpractice Case proceeds. Thus, CVWC's interest in the Malpractice Case plainly exceeds the interest of EMC.[62]

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[60] 885 A.2d 163, 164, 168-169, 178 (Conn. 2005)

[61] In *Gurski*, the assignor bankruptcy estate, not the assignee, chose malpractice counsel. 885 A.2d at 166.

[62] Even though the CFA also provides that EMC is to be reimbursed its costs incurred in the Underlying Case from the proceeds of the Malpractice Case, it is likely EMC has little, if any, costs, as it was defended by the Utah Local Government Insurance Trust. (*See* R. 3043-3044, 2/5/13 City Council closed session meeting 21:24-22:11.)

Moreover, if a dispute arises between EMC and CVWC regarding performance of the Settlement Agreement, SW sides with CVWC against EMC, and EMC must then incur fees for separate counsel. This incentivizes EMC not to dispute CVWC's interpretation of the Settlement Agreement and adds to CVWC's overall control of the Malpractice Case.

EMC also misapprehends the significance of the CFA's provision that prevents EMC from settling the Malpractice Case without CVWC's consent or a mandatory arbitration. EMC argues that "Cedar Valley cannot force the City to accept or reject a settlement offer" and that the CFA "merely allows" CVWC "to comment upon and mediate the reasonableness of the offer . . . Failing that, an independent neutral ***may need*** to become involved." (*See* EMC's Brief at 25.) (emphasis added.) This shows that EMC may not make an independent decision regarding settlement. If EMC attempted to do so, CVWC would undoubtedly claim that EMC was in breach of the Settlement Agreement and CFA. And since CVWC is entitled to be reimbursed all its costs of litigation in both the Underlying Case and the Malpractice Case up front as well as one-third of the proceeds from any settlement, CVWC has a strong incentive to only agree to a settlement that is in CVWC's best interest regardless of whether it is best for EMC. In addition, since arbitration is mandatory under the CFA in case of a dispute over settlement, CVWC is in a very real sense in a position to compel EMC by way of arbitration to accept a settlement that CVWC wants and EMC may not want. If EMC and CVWC reached the point of a mandatory arbitration, then they are adversaries in the arbitration, and under the terms of the CFA, SW can represent CVWC against EMC. This clearly shows the significant level of control CVWC holds over settlement negotiations.

In another similar case, the Florida 4th District Court of Appeal held in *Greene v. Leasing Associates, Inc.*,[63] that the settlement in the underlying case was void because it included the invalid assignment of a legal malpractice claim. Greene was one of Leasing Associates' attorneys in the underlying action. His advice to pursue litigation resulted in sanctions against Leasing Associates and Greene for hundreds of thousands of dollars in legal fees and costs owed to the adverse parties in the underlying case, the MHR companies, and the MHR companies' law firm, Berger Singerman. The MHR companies, Leasing Associates, and their respective lawyers, ***except for Greene***, reached a settlement of the underlying case. The appellate court described the settlement, in part, as follows:

> As a condition of the settlement, Leasing Associates agreed to pursue a malpractice action against Greene and pay Berger Singerman proceeds from the suit in an amount sufficient to cover five specified categories of legal fees and costs. . . . Leasing Associates agreed to "cooperate and assist in the prosecution" of the Greene malpractice action, which the settlement agreement described as "the essence of this Agreement . . . [that] shall be enforced to assure its performance in its entirety." Leasing Associates agreed to waive the "attorney client" and "attorney work product" privileges "applicable to any and all evidence relevant" to the malpractice action.
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> The settlement agreement required Leasing Associates to retain Berger Singerman to prosecute the Greene malpractice action. As part of the settlement, the company entered into a retainer agreement/engagement letter with Berger Singerman.[64]

The trial court entered judgment against Greene on the malpractice claim. Greene appealed, claiming "that the trial court should have dismissed Leasing Associates' malpractice claims because the settlement agreement was tantamount to an assignment that

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[63] 935 So.2d 21 (Fla. 4th DCA 2006).
[64] *Id.* at 23.

made the MHR companies and Berger Singerman the 'actual but unnamed plaintiffs' in the malpractice lawsuit."[65] After identifying some of the public policy reasons for not allowing assignment of legal malpractice claims, the court stated: "These strong public policy considerations have led to the application of the general rule [against assignment] 'even in the absence of a formal assignment of the claim.'"[66]

The Florida court described the settlement terms in *Greene*:

> The MHR companies and Berger Singerman sought to recover an amount in excess of what they received in settlement from Leasing Associates. Leasing Associates had a malpractice claim against Greene for leading the company down the path to sanctions. ***The MHR companies and Berger Singerman traded their right to recover additional money from Leasing Associates for the right to recover in the company's malpractice suit against Greene.***
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> Most importantly, the terms of the settlement placed the reins of the malpractice lawsuit in the hands of Berger Singerman, leaving Leasing Associates with little actual control . . . Leasing Associates was not free "to control the conduct of [the litigation and] to accept or reject any settlement offers." . . . This is a case where Leasing Associates essentially turned its legal malpractice claim over to its former adversary, a situation "generally recognized as the worst excess to be avoided."[67]

Similar to the conclusions in *Greene*, EMC has given up the ability to control the malpractice case. It cannot settle the case without CVWC's consent or without a formal mediation or arbitration. Any proceeds will go first to CVWC's costs and expenses. The same attorneys who represented EMC's adversaries in the Underlying Case now represent EMC and will receive a one-third contingent fee from any malpractice recovery. As such, CVWC and SW have "traded their right to recover additional money from [EMC] for the

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[65] *Id.* at 24.
[66] *Id.*
[67] *Id.* at 25. (emphasis added.)

right to recover in [EMC's] malpractice suit against [PKH]", which is "the worst excess to be avoided." Under all the circumstances, the Settlement Agreement and the CFA constitute an assignment of a malpractice claim, which this court should hold is unenforceable based on public policy.

C. The Settlement Agreement and CFA Are Integrated, Merged and Unambiguous. No Parol Evidence is Necessary.

EMC argues that because there is no express assignment language in the Settlement Agreement and CFA, the district court should have considered after-the-fact declarations from Pili and Jackson regarding before-the-fact settlement discussions or understandings (EMC's Brief at 18-19). This is incorrect for several reasons.

First, the Settlement Agreement specifically states that it and the CFA "contain the entire agreement and understanding of the parties with respect to the subject matter hereof, and ***integrates all prior conversations, discussions or undertakings of whatever kind or nature and may only be modified by a subsequent writing duly executed by the parties hereto***."[68] The CFA also contains its own similar integration clause.[69] Thus, the district court correctly found that the Agreements are integrated documents that are merged with each other, and EMC cannot attempt to change the plain and unambiguous meaning set forth in the Agreements by way of subsequent declarations.[70]

Second, EMC's argument that the district court ignored any so-called disputed facts

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[68] R. 3053, Settlement Agreement at 3, ¶ 7 (emphasis added.)
[69] *See* Note 24, above.
[70] PKH specifically objected to evidence submitted by way of Pili's and Jackson's declarations.

is incorrect. The district court specifically stated that he reviewed "the affidavits and other evidence presented," and from that he determined the material and undisputed facts. (R. 2628.)

Third, the absence of formal assignment language does not change the conclusion that the plain language of the Agreements establishes an assignment. PKH did not argue the existence of formal assignment language before the district court. PKH's position that such is unnecessary is supported by many cases. The undisputed material facts establish that EMC assigned both interest and control of its legal malpractice claim to CVWC.[71]

Fourth, EMC's argument that filing the Malpractice Case was not a condition of Settlement because recitals are not contractual is simply wrong. (*See* Appellant's Brief, p. 20.)[72] Initially, EMC did not preserve this argument in the district court.

> As a general rule, claims not raised before a trial court may not be raised on appeal. As part of this preservation requirement, a party must have introduced supporting evidence or relevant legal authority in the trial court. The mere mention of an issue without introducing relevant legal authority does not preserve an issue for appeal.[73]

At no point before the district court did EMC raise an issue or introduce any relevant legal authority concerning the binding nature of recitals. Accordingly, such matters should not be considered on appeal.

Next, EMC's argument is factually and legally wrong. Factually, Recital C

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[71] R. 2628-2631, 10/2/15 Ruling at 3-6, ¶¶ 1-12.

[72] Many cases do not require that filing a malpractice case be ***a condition*** of the underlying settlement in order for the assignment to be improper. It is enough that the settlement agreement includes an agreement to file a malpractice case.

[73] *Zufelt v. Haste, Inc.*, 2008 Utah App. 289, *2 (citations omitted).

specifically states: "***As part of the Settlement Agreement***, [EMC] has agreed to make demand and if needed file and prosecute a complaint against PKH . . . ." (emphasis added). By signing the CFA, EMC and CVWC agreed and recognized that pursuing the Malpractice Case against PKH was "part of the Settlement Agreement." *Id.* Legally, the Utah Supreme Court has recognized that recitals are contractual in nature and binding on the signatories when they contain information that describes the parties' agreement. In *Paloni v. Beebe* [74] the Court explained that when recitals contain contractual information they become contractual in nature and parol evidence cannot be introduced to change written contractual language. While the subject provisions were labeled "recitals," they contained the parties "mutual promises . . . for each other" and thus, must be viewed as contract language.[75]

D. The District Court Correctly Held That the Policy Reasons For Not Allowing Assignment of Legal Malpractice Claims Are Present.

The district court correctly recognized that the public policy considerations for disallowing assignment of malpractice claims exist in this case.

1. *EMC exploited and merchandised its legal malpractice claim.*

EMC officials have admitted to exploiting their legal malpractice claim to negotiate a more favorable settlement. Pili so testified. As such, it was not necessary for EMC to post its legal malpractice claim on Ebay. (*See* EMC's Brief at 27.)

In addition, EMC is wrong in its apparent argument that the Utah Supreme Court

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[74] 100 Utah 115 (1941).
[75] *Id.* at 118.

approved the merchandising of legal malpractice claims under the facts of the instant case because it found in *Snow, Nuffer, Engstrom & Drake v. Tanasse* "that a legal malpractice claim can be reached through an ***involuntary transfer*** such as execution."[76] *Tanasse* is clearly distinguishable. First, there was no voluntary assignment by the client.[77] This eliminates many of the public policy concerns. Second, the malpractice claim was not acquired by the client's adversary from the underlying case. One of the primary circumstances in which improper assignments have been found is where the legal malpractice claim is assigned to the assignor's adversary. In *Gurski Rosenblum & Filan, LLC*, for example, the Court stated "we conclude that the assignment of a malpractice action to an adverse party in the underlying action creates a distortion that the profession cannot endure and thus should not tolerate."[78]

2. *The sanctity of the attorney-client relationship has not been preserved.*

The terms of the Settlement Agreement and CFA make EMC's private communications with PKH open to CVWC – EMC's former adversary. As CVWC's attorney, SW is obligated to share case-related information and decisions with CVWC, including information about EMC and PKH's private attorney-client communications. *See* Utah R. Prof. Conduct 1.4 ("A lawyer shall . . . promptly inform the client . . . reasonably consult with the client . . . keep the client reasonably informed . . . .").

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[76] 1999 UT 49, ¶ 9. (emphasis added.)
[77] *Id.* at ¶ 8. ("Tanasse never attempted to voluntarily assign his legal malpractice claim, and Snow Nuffer has not tried to assign the claim since acquiring it through execution.")
[78] 885 A.2d at 175.

3. *The opportunity and incentive for collusion is present.*

Evidence of actual collusion does not have to be presented for public policy concerns to be triggered. Rather, the majority position has clearly articulated that public policy concerns arise simply by the creation of an opportunity for and/or an incentive to collude. In *Gurski v. Rosenblum & Filan, LLC*,[79] the Court noted that many assignments of legal malpractice claims have been invalidated because the "assignments create[d] an opportunity and incentive for collusion." Further, in *Kommavongsa v. Haskell*,[80] the Supreme Court of Washington invalidated an assignment of a legal malpractice claim after "merely observ[ing] that the opportunity and incentive for collusion [was] certainly present . . . ."

An opportunity and incentive for collusion clearly exist in this case. As the district court pointed out, now that EMC and CVWC are working together to sue PKH, nothing prevents EMC and CVWC from stipulating to artificially inflated damages and using the inflated stipulation as grounds for an unjustly high damage award in the 'trial within a trial' phase of the Malpractice Case. (R. 2639.)

4. *There has been a clear shift in positions.*

"[T]he majority [of] jurisdictions . . . disapprove of an assignment to an adverse party in the underlying action because it would necessitate a duplicitous change in the positions taken by the parties in the antecedent litigation."[81] The Court in *Edens*

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[79] *Id.* at 171.
[80] 67 P.3d 1068, 1078 (Wash. 2003),
[81] *Gurski v. Rosenblum & Filan, LLC,* 885 A.2d 163, 173 (Conn. 2005) (citation omitted).

Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC, explained that the shift in position would:

> give prominence (and substance) to the image that lawyers will take any position, depending on where the money lies, and that litigation is a mere game and not a search for truth. It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (***and clients***) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching.[82]

In the Underlying Case, EMC defended and argued that the triggering events for collection and payment of the water impact fees had not occurred. The trial court agreed with EMC's position regarding the triggering events and on two motions for partial summary judgment awarded only a small percentage of what CVWC claimed it was owed. In the Malpractice Case, EMC has shifted its position and adopted CVWC's molecule theory argument from the Underlying Case that the full amount under the CPA, plus interest, was due and should have been collected and paid by 2007.[83] PKH specifically identified this reversal for the district court. (R. 4153-4153.)

In addition, in the Underlying Case, EMC argued that the CPA was unambiguous and sought to exclude much of CVWC's proposed trial evidence. However, in order to successfully argue the Malpractice Case, EMC now seeks to show that the CPA was ambiguous. (*See* R. 4102-4104, PKH's Reply Summary Judgment Memo at 17-19, ¶ 25.)

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[82] 675 F.Supp.2d 75, 80 (D.D.C. 2009) (emphasis added.)

[83] *See* R. 3447-3448, n. 10, EMC's Opposition Memo to PKH's Motion for Summary Judgment. EMC adopted CVWC's water molecule theory, which EMC had argued against and Judge Mortensen rejected in the Underlying Case. *See also* footnote 13 and accompanying text, infra.

Such an argument runs directly counter to one of EMC's primary legal positions in the Underlying Case which was ruled in EMC's favor in the Underlying Case.

5. *EMC and CVWC's agreement is not a simple contingency fee arrangement.*

The Settlement Agreement and CFA entered into by EMC and CVWC was not a simple contingency fee agreement between an attorney and client. "A contingency fee arrangement is one in which the fee is made contingent on the outcome of the matter upon which the services are rendered." *Wright v. Guy Yudin & Foster, LLP,* 176 So. 3d 368, 371 (Fla. App. 2015) (citation omitted). A contingency fee arrangement relates to the sharing of proceeds parties hope to obtain. The CFA goes well beyond this, requiring that the client (EMC) bring a malpractice claim against PKH, that EMC share the proceeds of that suit with its the former adversary (CVWC), that the former adversary will cover the cost of bringing the malpractice claim, and the former adversary must give consent before EMC can settle the malpractice claim.

E. This Court Should Affirm, But Order Dismissal With Prejudice. Otherwise, The Court Should Affirm the District Court's Order that CVWC and SW Not be Involved in Any Re-Filed Malpractice Claim.

1. Dismissal With Prejudice is Appropriate.

While recognizing that dismissal without prejudice is an alternative, PKH requested that the complaint be dismissed with prejudice. (R. 2796.) There is precedent for dismissal with prejudice.[84] The alternative to a dismissal with prejudice is a dismissal without prejudice, but subject to Judge Brady's specific conditions for re-filing, including that SW

[84] *See e.g., Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005); *Zuniga v. Groce*, 878 S.W. 2d 313 (Tex. App. – San Antonio 1994).

may not represent EMC. By openly opposing this condition and arguing that it not be disqualified, SW is taking a position contrary to EMC's best interests. Someone other than SW needs to be advising EMC on this. Specifically, EMC avoided an order of dismissal with prejudice because of the two conditions for re-filing. If EMC persists in its opposition to the condition regarding SW, then EMC should not be entitled to the benefit of a dismissal without prejudice. The Court should order dismissal with prejudice.

2. *Dismissal With Conditions for Re-Filing.*

Judge Brady adopted the alternative and ordered dismissal without prejudice allowing EMC to refile its malpractice claims but only if it "satisfies the Court that it will be prosecuted independently of the settlement agreement." (R. 2641, 10/2/15 Ruling at 16.) At a minimum, this requires that EMC has "establishe[d] that it is not controlled ***in any way*** by CVWC and is not represented by attorneys associated with CVWC." (emphasis added.) Accomplishing the first condition will be a significant task in and of itself for EMC. As to the second condition, Judge Brady's 10/2/15 Ruling did not violate EMC's ability to choose its counsel.[85] Moreover, as recognized by EMC, the presumption in favor of a party's choice to counsel is overcome by the existence of a conflict of interest. (*See* EMC's Brief, p. 32, citing *Wheat v. United States,* 486 U.S. 153, 164 (1988)).

PKH will discuss the conflict issue below, but first and more importantly, SW's disqualification is inherent in the public policy reasons identified by Judge Brady that

[85] As noted previously, the issue is not simply whether EMC chose SW as malpractice counsel, but rather that SW was counsel for EMC's adversary (CVWC) in the Underlying Case and continues to be CVWC's counsel in the Malpractice Case.

preclude the assignment. As such, PKH did not need to file a motion to disqualify SW.

As to conflicts, there are several. PKH identified one that is being perpetuated in this very appeal as noted immediately above. Another is that SW was retained to represent the interests of both EMC and CVWC in the Malpractice Case. However, if a disagreement arises between EMC and CVWC concerning the Agreements, SW represents CVWC against EMC. EMC will be forced to hire and pay for new counsel. The fact that EMC would have to retain and pay for separate counsel in case of a dispute with CVWC is incentive for both EMC and SW to avoid conflict, even if may not be in EMC's best interest.

A third is that SW is obligated to disclose information to CVWC about EMC that EMC might otherwise have intended to be privileged or confidential. The CFA expressly provides for the sharing of information between SW, EMC and CVWC. As a result, the private attorney-client conversations between EMC and PKH are now open to EMC's former adversary, CVWC. EMC's claim that it is not discussing case information with CVWC is of no significance. Even if EMC and CVWC are not sharing case information with one another, SW is obligated by Rule 1.4 of the Utah Rules of Professional Conduct to inform, consult and advise both EMC and CVWC as to strategy and case-related decisions. Accordingly, CVWC is, or at least should be, receiving information about the Malpractice Case from SW.

Fourth, the terms of the CFA create situations in which SW would not be able to fulfill loyalty duties to both clients. For example, if EMC wanted to settle the Malpractice Case, but CVWC did not, SW could not properly advise both clients as to how they should

best handle the situation. Further, as mentioned above, if a disagreement about the Settlement Agreement arises, SW sides with CVWC and EMC is left scrambling to obtain legal guidance.

3. *Issues relating to disqualifying SW were fully briefed. A separate motion to disqualify was not required.*

EMC has not cited authority suggesting that PKH was obligated to file a motion to disqualify SW. As noted already, SW's disqualification is inherent in the public policy issues and was plainly raised in the district court. In its summary judgment motion, PKH specifically argued, "If this court dismisses the case without prejudice and EMC chooses to re-file, EMC cannot be controlled in any way in that litigation by CVWC and cannot be represented by SW." The Court's ruling disqualifying SW was not a surprise to EMC. The case law requiring disqualification was cited and argued. Public policy is the reason for disqualification because EMC cannot have its adversary's lawyer represent it in the Malpractice Case.[86]

4. *EMC cannot avoid Judge Brady's Order.*

The intent of Judge Brady's order is clear. If EMC opts to re-file its malpractice claim against PKH, EMC cannot be represented "by attorneys associated with CVWC." EMC is not to be represented by any attorney who is or has been associated with CVWC

[86] Even if PKH had not raised the issue of disqualifying SW, "the court has inherent power to disqualify attorneys practicing before it." *Applied Asphalt Techs. v. Sam B. Corp.*, NO: 2:14-cv-00800 JNP-DBP, 2016 WL 427070 (D. Utah Feb. 3, 2016) (unpublished); "A court has broad discretion and the inherent authority to disqualify counsel or a law firm." *Brigham Young Univ. v. Pfizer, Inc.*, 2010 U.S. Dist. LEXIS 146046, * 25 (D. Utah) (unpublished). Judge Brady did not have to wait for PKH to file a motion to disqualify before disqualifying SW.

and with EMC in this case. EMC's suggestion of possible ways to get around Judge Barney's Order is not appropriate or helpful. (*See* Appellant's Brief, p. 33.) Even if SW were to cease its representation of CVWC, an "association" would still exist between SW and CVWC based on their previous interactions, representations and dealings and SW would still be prohibited, pursuant to Judge Barney's Order, from representing EMC in the re-filed Malpractice Case.

5. *Judge Brady's decision to disqualify SW was supported by legal precedent.*

EMC's attempt to distinguish *Edens Tech., LLC,* 675 F. Supp. 2d 75, is not persuasive. PKH cited *Edens* in the lower court and certainly continues to believe that *Edens* is applicable to this matter and has strong convincing value.[87] However, the district

[87] In *Edens,* Edens Technologies alleged that Kile Goekjian Reed & McManus ("KGRM") negligently advised it that its golf simulation device did not infringe on a patent owned by Golf Tech. In reliance on KGRM's advice, Edens launched its device. Golf Tech sued Edens for patent infringement. Edens retained KGRM to represent it in the litigation along with Maine local counsel, Kurt Olafsen. Shortly before trial, Edens did not think KGRM was prepared for trial and thus, substituted Olafsen as its counsel. Thereafter, the case settled with Edens agreeing to entry of a $734,246 consent judgment in favor of Golf Tech. The settlement also required Edens to file a legal malpractice lawsuit against KGRM and assign to Golf Tech the proceeds recovered from the malpractice suit up to $743,246. Edens was the named plaintiff in the malpractice case, but Golf Tech paid all the litigation costs and attorney fees. Edens was represented in the malpractice case by the same law firm which had represented Golf Tech in the underlying infringement suit. KGRM moved to dismiss the malpractice case on the grounds that assignment of proceeds from a legal malpractice claim was against public policy. The district court described the issue as follows: "The issue in this case is . . . whether a company can assign its legal malpractice claim to a former litigation adversary as part of the settlement of that litigation." *Id.* at 79. The district court concluded that "this Court agrees with the reasoning of those courts which have invalidated such assignments as contrary to public policy." *Id.* The court invalidated the assignment and put the following terms on Edens' ability to refile its malpractice claim. "[I]f Edens elects to re-file a malpractice claim against KGRM, it cannot be controlled in any way by Golf Tech or be represented by attorneys associated with Golf Tech." *Id.* at 86. This case is factually analogous to *Edens.* Just like in *Edens,*

court did not base its decision to disqualify SW on *Edens*. Rather, Judge Brady cited *Davis v. Scott,* 320 S.W.3d 87. (R. 2641.) EMC has not attempted to distinguish *Davis*. Judge Brady's Order disqualifying SW was consistent with the ruling in *Davis*.

6. PKH is not seeking a strategic advantage.

PKH's request that SW be disqualified was based on the existence of an invalid and improper legal assignment, not an attempt to obtain a strategic advantage. EMC's best interests are certainly not being promoted by SW by making this argument because ultimately the re-filing conditions are an alternative ground taken by Judge Brady rather than dismissing the case with prejudice. The timing of PKH's motion for summary judgment does not suggest ill-intent. PKH filed its summary judgment motion within a reasonable amount of time after discovering necessary information.

EMC is the named plaintiff, but CVWC is the party paying the litigation costs associated with the Malpractice Case. Moreover, EMC is represented by the same attorney who represented CVWC in the Underlying Matter. While Judge Brady did not cite *Edens* in conjunction with setting restrictions on EMC's ability to re-file its malpractice claims, the decision in *Edens* fully supports his ruling.

CONCLUSION

Based on the foregoing, PKH respectfully requests that this Court affirm the district court's grant of summary judgment, but also order dismissal with prejudice.

DATED this 20th day of July, 2016.

STRONG & HANNI

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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 12,577 words (including Caption and Complete List of Parties).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman.

DATED this 20th day of July, 2016.

STRONG & HANNI

By Stuart H. Schultz

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Byron G. Martin
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2016, two true and correct copies of the foregoing **BRIEF OF APPELLEES** was served by the method indicated below, to the following:

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ADDENDUM

A. District Court's October 2, 2015 Ruling

FOURTH DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, SPANISH FORK DEPARTMENT

EAGLE MOUNTAIN CITY, Plaintiff, vs. PARSONS KINGHORN HARRIS, Defendant.	**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT**
PARSONS KINGHORN HARRIS, Third-Party Plaintiff, vs. WILLIAMS & HUNT, P.C.; et al. Third-Party Defendants.	Case No. 130300194 Judge James Brady

This matter comes before the court on Defendant's motion for summary judgment. Defendant seeks the dismissal of Plaintiff's complaint on the basis that Plaintiff has assigned interests in its legal malpractice lawsuit in a manner that violates public policy. Plaintiff's complaint includes three separate causes of action. The first cause of action is based on a claim that Defendant negligently performed its duties a legal counsel for Plaintiff. The second cause of action is based on a claim that Defendants breached its fiduciary duties as legal counsel to Plaintiff. The third cause of action is based on a claim that Defendant breached contractual obligations owed to Plaintiff as legal counsel. All three causes of action are based on the attorney-client relationship between Plaintiff and Defendant, and Plaintiff alleges Defendant's

deficient legal services violated standards, established in both tort and contract. All three of Plaintiff's claims have in common that they allege legal malpractice by Defendant. The parties briefed and argued this motion on the basis of the assignment of a legal malpractice claim and did not differentiate between the three types of malpractice alleged in the complaint. Neither party argued for individual causes of action to be dismissed or to survive. After reviewing the memoranda, affidavits, exhibits, pleadings on file and hearing the parties' oral arguments, the court took this motion under advisement. Having considered the facts and issues presented, the court now enters this ruling GRANTING defendant's motion. In granting this motion, the Court intends this order to dismiss all three causes of action, without prejudice, subject to Plaintiff's right to re-file its Complaint if it meets the conditions stated below.

The standard for summary judgement applied by the Court is that summary judgment "shall be rendered if the pleadings, deposition, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), URCP. Additionally, "the facts and all reasonable inferences drawn therefrom [are viewed] in the light most favorable to the nonmoving party." Jackson v Mateus, 2003 UT 18, §2, 70 P.3d 78 (internal citation omitted). Summary judgement "denies the opportunity of trial [and so] should be granted only when it clearly appears that there is no reasonable probability the party moved against could prevail." Utah State Univ. Of Agric. And Applied Sci. V. Sutro & Co., 646 P.2d 715, 720 n. 14 (Utah 1982).

UNDISPUTED MATERIAL FACTS

Defendant's motion addresses two legal issues, 1) Does Eagle Mountain City's ("EMC")

Settlement Agreement with Cedar Valley Water Company ("CVWC") and their joint Contingent Fee Agreement with Snell & Willmer ("SW"), (here after jointly referred to as "Agreements") constitute an assignment of a malpractice claim; and, 2) If it is an assignment of a malpractice claim does it bar EMC from pursuing its malpractice claims against Parsons Kinghorn Harris ("PKH"). Both parties spent much time and effort informing the Court of the facts and issues raised in the underlying case, most of which are not material to either question. From the affidavits and other evidence presented, the court finds the following facts are both material and uncontested:

1. EMC is suing PKH claiming legal malpractice based on tort and contract theories.

2. EMC alleges, among other things, that:

   a. Pursuant to the 2001 Town Well #1 Capacity Purchase Agreement, an Impact Fee Ordinance ("IFO") was enacted by EMC, City Ordinance No. 00-02, in 2000.

   b. Under the terms of the IFO, EMC would collect impact fees under certain specific triggering events from "development applicants" that transferred water rights to EMC which relied on Well #1 as the point of diversion.

   c. EMC did not collect impact fees from developers based on PKH's alleged incorrect advice.

   d. PKH, through attorney Gerry Kinghorn, who was EMC's City Attorney, allegedly incorrectly advised EMC from 2000 through 2011 not to collect impact fees.

   e. PKH's improper advice allegedly damaged EMC because EMC is required to pay CVWC money it would not have had to pay if EMC had collected impact fees from developers, including $4,560,000 that EMC is required to pay CVWC as

part of the February 5, 2013 Settlement of the Underlying Case. This allegedly constitutes professional negligence, breach of fiduciary duty, and breach of contract.

3. Snell & Willmer represented CVWC in the Underlying Case against EMC.

4. On February 5, 2013, EMC and CVWC finalized the settlement of the underlying case and memorialized it in a signed written Settlement Agreement and a separate Contingent Fee Agreement.

5. Excluded from the Release contained in the Settlement Agreement "are any and all claims [EMC] may have against its own attorneys [PKH], as set forth in the Contingent Fee Agreement identified in paragraph 7" of the Settlement Agreement.

6. Paragraph 7 of the Settlement Agreement, entitled "Integration," states: Except as expressly stated herein, this Agreement and a companion Contingent Fee Agreement, contain the entire agreement and understanding of the parties with respect to the subject matter hereof, and integrates all prior conversations, discussions or undertakings of whatever kind or nature and may only be modified by a subsequent writing duly executed by the parties hereto.

7. EMC and CVWC entered into the Contingent Fee Agreement in connection with settling the underlying Case.

8. The Contingent Fee Agreement is binding upon EMC, CVWC and SW and their respective heirs, legal representatives and successors and assigns in interest.

9. The Contingent Fee Agreement provides among other things that:

   a. As part of the settlement of the Underlying Case, EMC is obligated to file and

prosecute the Malpractice Case against PKH.

b. Both EMC and CVWC retain SW as their attorney to prosecute the Malpractice Case on EMC's and CVWC's behalf against PKH.

c. Since both CVWC and EMC are clients of SW, "communications between the jointly represented Clients and [SW] are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. Accordingly, [SW] is free to share with both Clients communications and information which [SW] has or obtains from any of the Clients respecting the [Malpractice Case]."

d. EMC, CVWC, and SW will each receive one-third of any recovery from PKH in the Malpractice Case, after payment of costs, and absent an appeal.

e. SW's one-third contingent fee is calculated on the amount of sums recovered from PKH (including its insurers), after out of pocket expenses are first deducted from such recovery.

f. All costs incurred in connection with the Malpractice Case shall be paid by CVWC, including payments in advance when requested by SW, and such costs shall be reimbursed to CVWC first from any recovery realized in the Malpractice Case. Those costs include "sums expended for subpoenas, photos, photocopies, scanning, facsimiles, telephone calls, exhibits used at hearings, depositions, court reporter costs, reports, witness statements, expert witnesses, and all other out-of-pocket expenses directly incurred in investigating or litigating the [Malpractice Case against PKH].

g. Costs shall also include the out of pocket expenses that [CVWC] and [EMC]

prosecute the Malpractice Case against PKH.

b. Both EMC and CVWC retain SW as their attorney to prosecute the Malpractice Case on EMC's and CVWC's behalf against PKH.

c. Since both CVWC and EMC are clients of SW, "communications between the jointly represented Clients and [SW] are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. Accordingly, [SW] is free to share with both Clients communications and information which [SW] has or obtains from any of the Clients respecting the [Malpractice Case]."

d. EMC, CVWC, and SW will each receive one-third of any recovery from PKH in the Malpractice Case, after payment of costs, and absent an appeal.

e. SW's one-third contingent fee is calculated on the amount of sums recovered from PKH (including its insurers), after out of pocket expenses are first deducted from such recovery.

f. All costs incurred in connection with the Malpractice Case shall be paid by CVWC, including payments in advance when requested by SW, and such costs shall be reimbursed to CVWC first from any recovery realized in the Malpractice Case. Those costs include "sums expended for subpoenas, photos, photocopies, scanning, facsimiles, telephone calls, exhibits used at hearings, depositions, court reporter costs, reports, witness statements, expert witnesses, and all other out-of-pocket expenses directly incurred in investigating or litigating the [Malpractice Case against PKH].

g. Costs shall also include the out of pocket expenses that [CVWC] and [EMC]

incurred in connection with the prosecution of the claims on the 2000 Agreement, which amounts the parties agree shall be reimbursed from the first proceeds of any recovery on the [Malpractice Case against PKH].

h. EMC cannot settle the Malpractice Case without CVWC's consent. Absent mutual agreement, the parties must first mediate and subsequently submit, if necessary, to mandatory arbitration.

i. EMC and CVWC consent to SW's continued representation of CVWC in connection with the enforcement of, or any dispute arising from or between [EMC] and [CVWC] relating to the Settlement Agreement [in the Underlying Case]. Should a dispute arise between [EMC] and [CVWC] relating to the Settlement Agreement, except as may be required by the Utah Rules of Professional Responsibility, [SW] will represent the interests of [CVWC] against the interests of [EMC].

10. John Walden signed the Contingent Fee Agreement on behalf of CVWC as its Managing Member.

11. Ifo Pili signed the Contingent Fee Agreement on behalf of EMC as its City Administrator.

12. Mark Morris signed the Contingent Fee Agreement on behalf of SW as a Partner.

ANALYSIS:

Does the Settlement Agreement and the Contingent Free Agreement Constitute an Assignment of EMC's Claim of Legal Malpractice.

It is important to note that although PKH asks the court to declare the Agreements are ***unenforceable***, nothing in this ruling is intended to rule on the enforceability or respective rights of SW, CVWC and EMC in the Settlement Agreement and Contingent Fee Agreement. These are issues between SW, CVWC and EMC and are not before this court. A resolution of those issues would require, at a minimum, the inclusion of SW and CVWC as parties, and an opportunity to be heard. The issue before this court is not the enforceability of the Settlement Agreement and Contingent Fee Agreement between its interested parties, but rather whether as a consequence of entering these agreements, has EMC apparently assigned interests in a legal malpractice claim, and if so, does the assignment violate public policy.

EMC argues the Contingency Fee Agreement is merely a means of EMC sharing proceeds with CVWC, a common practice. The Court disagrees. EMC's argument that it has not assigned the claim to CVWC are inconsistent with the content of the Agreement. Even the Recitals to the Contingency Fee Agreement provides that, "**City [EMC] and Cedar Valley [CVWC] desire to retain Attorney to bring the Lawsuit against PKH. . .**" This provision begs the question, if CVWC did not receive even an assignment of interest in EMC's claims, why does CVWC "desire to retain the attorney" to pursue the claim? Paragraph 5, 5 b., and 6 e. of the Contingency Fee Agreement also support the position that EMC and CVWC believe they each have the need for legal representation to pursue their interests in the EMC malpractice claim.

The Court finds the following provisions of the Contingent Fee Agreement grant some of EMC's interests in the current case to CVWC:

a. As part of the settlement of the Underlying Case, EMC agrees to . . . file and prosecute a complaint against PKH . . . alleging negligence and related malpractice claims, solely on the terms and conditions of this agreement (Contingent Fee Agreement, Recitals Paragraph C).

b. City [EMC] and Cedar Valley [CVWC] desire to retain Attorney [SW] to bring the lawsuit against PKH. . .(Contingent Fee Agreement, Recitals Paragraph D).

c. . . . communications between the jointly represented Clients [EMC and CVWC] and Attorney [SW] are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. (Contingent Fee Agreement, Paragraph 5.b)

d. In the Settlement Agreement, City [EMC] and Cedar Valley [CVWC] agreed that after payment of costs, each would receive one third. . . of the recovery, if any, from PKH in the Lawsuit. (Contingent Fee Agreement Recital Paragraph E).

e. Clients each agree that Attorney [SW] is entitled to one-third (1/3) of the sums recovered from PKH (including its insurers), after out of pocket costs are first deducted from such recovery. (Contingent Fee Agreement, Paragraph 1).

f. . . . all costs incurred in connection with the Lawsuit shall be paid by Cedar Valley [CVWC] but all amount of such costs shall be first repaid paid from any recovery received. (Contingent Fee Agreement Paragraph, 3.a).

g. In the event PKH (and/or its insurers) make an offer of settlement to Clients, and

they can not mutually agree on the terms of negotiated settlement of the Lawsuit, then the clients agree first to negotiate in good faith. Failing an agreement then the parties agree to mediate their dispute before a mediator. . .

a. In the event the dispute is not resolved by mediation, each of the two parties shall select an arbitrator and the two selected arbitrators shall select a third arbitrator . . .

b. . . . The decision of the three arbitrators whether to accept of reject the pending offer shall be binding on the clients. . .

Contingent Fee Agreement, Paragraph 7).

Assignment of Control of Litigation.

Assignment of rights to a legal claim, or chose in action, may include assignment of the right to control litigation of the claim, and/or assignment of property interest in the proceeds from the litigation. EMC argues the Agreements only grant CVWC an interest in the potential proceeds from the litigation, the Court disagrees. The Court finds that the Agreements grant CVWC and interest in both controlling the litigation and in the potential proceeds from the litigation. The provisions of the Agreements requiring EMC to 1)File the present lawsuit as a condition to settle the underlying litigation. 2)Be represented by a specific attorney agreed to by CVWC. 3) Allow the attorney to jointly represent EMC and CVWC in this case. 4)Waive client confidentiality with the attorney in this case to allow SW to disclose information regarding the litigation to CVWC. 5)Obtain prior approval by CVWC before it can settle the claim, or if the parties disagree, ultimately submit its rights to settle its case to binding arbitration.

The Settlement Agreement states it is integrated with the Contingent Fee Agreement. Therefore CVWC appears to have the ability to enforce these conditions, with the threat that EMC will suffer the consequences of a failed Settlement Agreement in the underlying case if EMC were to exercise independence in controlling its litigation decisions. Whether or not EMC and CVWC currently have any disagreements regarding these conditions is immaterial. It is sufficient for purposes of this motion that CVWC has the apparent ability to force EMC to forego its ability to independently control its litigation in the event a disagreement arises in the future. The Court finds the Agreements transfer a substantial degree of control over litigation decisions from EMC to CVWC in the EMC's malpractice claim.

Assignment of Property Interest

The Agreements also grant CVWC a property interest in EMC's claim. The Agreements go beyond providing security for payment of the Settlement amount in the underlying case. Instead of granting a security interest for a sum certain, the Agreements grant an uncertain amount, based on a percentage of the total amount of recovery. The Agreements grants CVWC an interest in EMC's property rights. It also grants CVWC a pecuniary incentive to maximize the amount of recovery by EMC.

The Settlement Agreement and Contingency Fee Agreement do not expressly assign the malpractice claim to CVWC. However, "the creation and existence of an assignment is to be determined according to the intention of the parties, which is to be discerned not only from the instruments executed by them, if an, but from the surrounding circumstances." 6A C.J.S. Assignments §57 (2010). From the Agreements, and the apparent intent of the parties the court finds that the Agreements constitute a partial assignment of EMC's malpractice claims.

Does the Partial Assignment of Property Interests in and Partial Control of a Malpractice Claim Bar EMC from Pursuing the Claim?

PKH argues that the public policies that would prohibit an assignment of EMCs malpractice claim should also apply to this partial assignment. Whether assigning all or a part of a malpractice claim violates a public policy and bars the assignor from pursuing its claim is a matter of first impression in Utah. Neither of the parties were able to find a controlling Utah case on this point. Although PKH asks the court to rely on the 1999 Utah Supreme Court case of *Snow v Tanasse,* 1999 UT 49 for support the Court finds that case is not helpful. *Snow* sheds no light on the question of partial assignments, and expressly declines to address the question of whether malpractice claims are assignable in Utah. When the same case was previously before the Court of Appeals as *Tanasse v Snow*, the Court laid out the majority and minority positions on the issue of whether a malpractice claim is voluntarily assignable, but the Appellate Court also expressly passed on deciding that issue for Utah. Where there is no controlling precedent, both parties have relied on the persuasiveness of cases from other states.

Majority Position:

According to *Snow v Tanasse,* and *Gurski v Rosenblum & Filian,* 885 A.2d 163, states that have adopted the position that legal malpractice claims are personal and can not be assigned include: Arizona, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Nevada Tennessee, Virginia, West Virginia. These states identify many overlapping public policy considerations including the unique and personal nature of the relationship between attorney and client, the need to preserve the sanctity of that relationship, confidentiality, and conflicts of interests among others, to support their adoption of

this majority position.

Minority Position:

According to *Snow v Tanasse*, states that adopted the position that legal malpractice claims are assignable include New York, Oregon and Pennsylvania. These states generally hold that legal malpractice claims are based on routine negligence or contract theories and should be assignable as are any routine tort or contract claim.

Neither party argued that this Court should adopt the minority position. Because of the public policy issues supporting the non-assignability of legal malpractice claims, this court adopts the majority position.

Public Policy Issues:

The court considered the following public policy concerns and rulings by courts in other states regarding assignability of legal malpractice claims:

- **Exploitation and merchandising of malpractice claims.** "It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The

commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession." (*See, Goodley v Wank & Wank*, 62 Cal. App. 3d 389)

- **Preservation of the Sanctity of the client-lawyer relationship**. "The assignment of a legal malpractice claim is perhaps most incompatible with the attorney's duty of loyalty. An attorney's loyalty is likely to be weakened by the knowledge that a client can sell off a malpractice claim, particularly if an adversary can buy it. If an attorney is providing zealous representation to a client, the client's adversary will likely be motivated to strike back at the attorney in any permissible fashion. If an adversary can retaliate by buying up a client's malpractice action, attorneys will begin to rethink the wisdom of zealous advocacy. A legal system that discourages loyalty to the client, disserves that client." "Unlike any other commercial transaction, the client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client's interests." (*See, Picadilly, inc. v Raikos,* 582 N.E.2d 338) For example, EMC's relationship with PKH was maintained for one purpose, to defeat CVWC's suit against EMC. CVWC was the antagonist who by initiating its lawsuit against EMC drove EMC to seek out the protection offered by the client-lawyer relationship with PKH.

- **Opportunity for Collusion.** One compelling argument against assignment is that "[p]ermitting an assignment of a legal malpractice claim to the adversary in the underlying litigation that gave rise to the legal malpractice claim . . . creates the opportunity and incentive for collusion in stipulating to damages in exchange for an agreement not to execute on the judgment in the underlying litigation." (*See, Gurski*, 885 A.2d at 174). Nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action. While it is not necessary to find that the consent judgment in the underlying litigation was the product of collusion or that the stipulated damages were unreasonable, the Court "merely observes that the opportunity and incentive for collusion were certainly present." *(See, Kommavongsa v. Haskell*, 67 P.3d at 1077).
- **An abrupt and shameless shift of positions in the malpractice case.** "The trial of this assigned malpractice claim would feature a public and disreputable role reversal. The mechanics of trying this case would magnify the least attractive aspects of the legal system. . . . Because of the unique nature of the trial within a trial [the] change in position would be obvious to all the jurors hearing the evidence. . . . They would rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered." *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338.
- **No distinction between as assignment of a cause of action and an assignment**

of recovery. Courts have found a "meaningless distinction" between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments (*See, Town & Country Bank v Country Mutual Ins.*, 121 Ill. App. 3d 216 and *Gurski v Rosenblum & Filian,* 885 A.2d 163).

The court recognizes that each of these are important public concerns that oppose the assignability of malpractice claims. These public policy concerns, combined with the parties failure to present support for the minority position, are sufficient to persuade the Court to adopt the majority position that malpractice claims should not be assignable. The Court also agrees with the reasoning of the Court in *Town & Country* that ". . . the distinction between the assignment of a cause of action for personal injuries and the assignment of the expectancy of recovery from such an action [is] a fiction not necessary to support some public policy. . . and [the Court] will not adopt this meaningless distinction to circumvent that public policy. If the assignment of the cause of action is void, the assignment of the expectancy of the proceeds is also void."

Although there is no express assignment of the claim in this case, it is obvious that the Agreements transfer to CVWC a substantial level of EMC control over the litigation decisions and a substantial portion of EMC's property rights. Although the Contingency Fee Agreement was drafted to state, "the parties agree," the Contingency Fee Agreement and the Settlement Agreement are merged, establishing the potential that a violation of the Contingency Fee Agreement's terms may result in consequences to EMC's benefits under the Settlement Agreement.

Based on the assignment of substantial control over litigation decisions and an interest in the potential proceeds of the current litigation the court finds the Agreements violate public policy.

EMC May Pursue its Claims Under Certain Conditions.

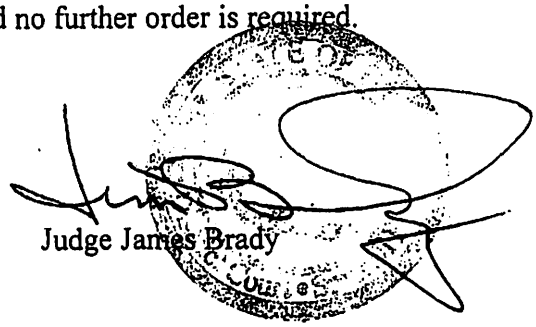
Nothing in this order prohibits EMC from pursuing its claims against PKH for malpractice. However, EMC may not do so under the restrictions placed on it by the Agreements. Similar to the decision in *Davis v Scott*, 320 S.W. 3d 87, the Court finds that EMC "has not forfeited its claim, but [the Court] can not ignore the fact that the present suit is born of the . . . assignment and is, therefore, tainted in some respect." EMC is permitted to pursue its claim against PKH if it satisfies the Court that it will be prosecuted independently of the settlement agreement. To do so, at a minimum, EMC needs to establish that its litigation is not controlled in any way by CVWC, and that EMC is not represented by attorneys associated with CVWC.

ORDER

EMC's complaint against PKH is dismissed without prejudice. EMC may re-file its claims against PKH if it establishes that it is not controlled in any way by CVWC and is not represented by attorneys associated with CVWC.

This Ruling and Order is final, and no further order is required.

October 2, 2015.



Judge James Brady

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130300194 by the method and on the date specified.

MANUAL EMAIL: JOSE A ABARCA jaabarca@stoel.com
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Date: 10/05/2015

/s/ JENNY HUGHES

Deputy Court Clerk